

Wage and Hour Division, Labor

§ 780.510

employed in the growing and harvesting of “shade-grown tobacco” and in the described processing of “such tobacco” in order that the section 13(a)(14) exemption may apply.

§ 780.507 “Such tobacco.”

To be within the exemption, the processing activities with respect to shade-grown tobacco must be performed by an employee who has been employed in growing and harvesting “such tobacco.” The term “such tobacco” clearly is limited to the specified type of tobacco named in the section, that is, shade-grown tobacco. While a literal interpretation of the term “such tobacco” might lead to a conclusion that the exemption extends only to the processing of the tobacco which the employee grew or harvested, it appears from the legislative history that the intent was to extend the exemption to the processing of such tobacco which may be viewed “as a continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.” (H. Rept. 75, 87th Cong., first sess., p. 26.) Thus, it appears that the term “such tobacco” has reference to the local crop of shade-grown tobacco, raised by other local growers as well as by the processor, and which is being processed as a continuation of the growing and harvesting of such crop in the vicinity.

§ 780.508 Application of the exemption.

(a) As indicated in § 780.504, an employee qualifies for exemption under section 13(a)(14) only if he is an agricultural employee employed in the growing and harvesting of shade-grown tobacco and is engaged in the processing of such tobacco. However, both operations do not have to be performed during the same workweek. Section 13(a)(14) of the Act is intended to exempt any agricultural employee from the minimum wage and overtime provisions of the Act in any workweek when he is employed in the growing and harvesting of shade-grown tobacco, irrespective of the provisions of section 13(a)(6) and whether or not in such workweek he is also engaged in the processing of the tobacco as described in section 13(a)(14). The exemption would also apply in any workweek in

which the employee, who grew and harvested shade-grown tobacco, is exclusively engaged in such processing.

(b) An employee so employed in any workweek is considered to be excluded from the “employee employed in agriculture” whose exemption from the pay provisions of the Act is governed by section 13(a)(6). Therefore, his man-days of exempt labor under section 13(a)(14) in any such workweek are not to be counted as man-days of agricultural labor within the meaning of section 3(u) of the Act and to which section 13(a)(6) refers.

(c) However, since section 3(u) defines man-day to mean “any day during which an employee performs any agricultural labor for not less than 1 hour” in the case of an employee who qualifies for the exemption in some workweeks but not in others under section 13(a)(14), all such man-days of his agricultural labor in the workweeks when he is not exempt under section 13(a)(14) will be counted. In this connection, the performance of some agricultural work which does not relate to shade-grown tobacco by an agricultural employee of a grower of such tobacco will not be considered as the performance of nonexempt work outside the section 13(a)(14) exemption in any workweek in which such an employee is employed by such an employer in the growing and harvesting of such tobacco or in its processing prior to stemming, or both, and engages in other agricultural work only incidentally or to an insubstantial extent.

§ 780.509 Agriculture.

The definition of “agriculture,” as contained in section 3(f) of the Act, is discussed in subpart B of this part 780. The principles there discussed should be referred to as guides to the meaning of the terms “agricultural employee” and “growing and harvesting” as used in section 13(a)(14).

§ 780.510 “Any agricultural employee.”

The section 13(a)(14) exemption applies to “any agricultural employee” who is employed in the specified activities. The term “any agricultural employee” includes not only agricultural employees of the tobacco grower but also such employees of other farmers

or independent contractors. “Any agricultural employee” employed in the growing and harvesting of shade-grown tobacco will qualify for exemption if he engages in the specified processing operations. The use of the word “agricultural” before “employee” makes it apparent that separate consideration must be given to whether an employee is an “agricultural employee” and to whether he is employed in the specified “growing and harvesting” within the meaning of the Act.

§ 780.511 Meaning of “agricultural employee.”

An “agricultural employee,” for purposes of section 13(a)(14), may be defined as an employee employed in activities which are included in the definition of “agriculture” in section 3(f) of the Act (see § 780.103), and who is employed in these activities with sufficient regularity or continuity to characterize him as a person who engages in them as an occupation. Isolated or sporadic instances of engagement by an employee in activities defined as “agriculture” would not ordinarily establish that he is an “agricultural employee.” His engagement in agriculture should be sufficiently substantial to demonstrate some dedication to agricultural work as a means of livelihood.

§ 780.512 “Employed in the growing and harvesting.”

Section 13(a)(14) exempts processing operations on shade-grown tobacco only when performed by agricultural employees “employed in the growing and harvesting” of such tobacco. The use of the term “and” in the phrase “growing and harvesting” may be in recognition of the fact that in the raising of shade-grown tobacco the two operations are typically intermingled; however, it is not considered that the word “and” would preclude a determination on the particular facts that an employee is qualified for the exemption if he is employed only in “growing” or only in “harvesting.” Employment in work other than growing and harvesting of shade-grown tobacco will not satisfy the requirement that the employee be employed in growing and harvesting, even if such work is on shade-grown tobacco and constitutes

“agriculture” as defined in section 3(f) of the Act. For example, delivery of the tobacco by an employee of the farmer to the receiving platform of the bulking plant would be a “delivery to market” included in “agriculture” when performed by the farmer as an incident to or in conjunction with his farming operations (*Mitchell v. Budd*, 350 U.S. 473), but it would not be part of “growing and harvesting.”

§ 780.513 What employment in growing and harvesting is sufficient.

To qualify for exemption the employee must be one of those who “were employed in the growing and harvesting of such tobacco” (H. Rept. No. 75, 87th Cong., First Sess., p. 29) and one whose processing work could be viewed as a “continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.” (Ibid. p. 26.) This appears to require that such employment be in connection with the crop of shade-grown tobacco which is being processed; it appears to preclude an employee who has had no such employment in the current crop season from qualifying for this exemption even if in some past season he was employed in growing and harvesting such tobacco. Bona fide employment in growing and harvesting shade-grown tobacco would also appear to be necessary. An attempt to qualify an employee for the processing exemption by sending him to the fields for growing or harvesting work for a few hours or days would not establish the bona fide employment in growing and harvesting contemplated by the Act. It would not seem sufficient that an employee has been engaged in growing or harvesting operations only occasionally or casually or incidentally for a small fraction of his work time. (See *Walling v. Haden*, 153 F. 2d 196.) Employment for a significant period in the current crop season or on some regular recurring basis during this season would appear to be necessary before an agricultural employee could reasonably be described as one “employed in the growing and harvesting of shade-grown tobacco.” The determination in a doubtful case will, therefore, require a careful examination and consideration of the particular facts.